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IN THE

Supreme Court of the United States

OCTOBER TERM 1940

No. 191

THE UNITED STATES,

Appellant,

vs.

KATE B. GOLTRA and E. FIELD GOLTRA, JR., Executors of the Estate of Edward F. Goltra, deceased,

Appellees.

No. 192

KATE B. GOLTRA and E. FIELD GOLTRA, JR., Executors of the Estate of Edward F. Goltra,

Cross-Appellants,

against

THE UNITED STATES,

Cross-Appellee.

ON APPEAL AND CROSS APPEAL FROM THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF OF APPELLEES-CROSS-APPELLANTS

RICHARD E. DWIGHT,
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Counsel for Appellees-Cross-Appellants.

January 3, 1941

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PRELIMINARY STATEMENT

The argument as to interest made by the Government in support of its appeal has been fully treated in our Main

Brief. That argument consists of an admittedly unsuccessful effort to rationalize two lines of authorities, both of which have been rendered wholly immaterial by the fact that there is here a special jurisdictional act under which this action has been brought.

In our Main Brief we have fully anticipated the Government's chief arguments as to the admissibility of the offer made by Standard Oil Company of Louisiana to rent the Goltra fleet (cf. Plff.'s Main Br., pp. 28-35, and Gov. Br., pp. 70-72). The statement (Gov. Br., p. 71) that the Standard Oil Company knew when it made the offer that the litigation prevented acceptance by Goltra must have been inadvertently made. The statement is unsupported by any record citation, is directly contrary to the record made in the Court of Claims and contrary to the stipulation here that the offer was made in good faith (R. 66-67). The Government's reference (Gov. Br., p. 72) to the statute (28 U. S. C. 269) providing that the Court of Claims may consider questions "whether exceptions were or were not taken" before the Commissioner, does not touch our point that the Court of Claims' Rules and the common law of evidence require objections when evidence is offered if the evidence is deemed incompetent (Main Br., pp. 33-34). Exceptions are not necessary; objections are essential to raise the point.

In this reply brief we answer only the contentions made by the Government in support of the decision below excluding from consideration the rental or productive value of the fleet and unloading apparatus, the interest differential and certain miscellaneous factors all of which should have been considered in making the award for just compensation.

I

JUST COMPENSATION FOR ALL THE PROPERTY RIGHTS TAKEN FROM GOLTRA MUST BE BASED UPON THE VALUE OF ALL THE INTERRELATED RIGHTS AND NOT UPON THE VALUE OF EACH SEPARATELY.

The Government seems to make no argument that the seizure of the fleet was not likewise a seizure of Goltra's contract rights which were dependent upon his possession of the fleet. The decisions in *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, and *Monongahela Navigat'n Co.* v. *United States,* 148 U. S. 312, require a consideration of the productive value of the fleet in the light of the contract under which the fleet was held; the contract rights were as much property as the fleet itself (see Plff.'s Main Br., pp. 18-22).

This case is wholly unlike *Mitchell* v. *United States,* 267 U. S. 341, *Joslin Co.* v. *Providence,* 262 U. S. 668, and *Bothwell* v. *United States,* 254 U. S. 231, referred to in the Government's brief (p. 68). Those cases stand for the general proposition that where the Government by power of eminent domain takes land, it takes such land only and does not take the business conducted thereon. The business in fact is not taken. It may continue elsewhere. Whatever peculiar value the land may have to the business conducted thereon is taken into consideration in determining the value of the land. But in our case the taking of the fleet necessarily took also every contract right which Goltra had in connection therewith. As the taking of the lock and dam in the *Monongahela Navigation Company* case was held necessarily to take the rights conferred by

the State franchise, so here the seizure of the fleet necessarily took the contract rights. Furthermore, unlike the situation in the cases cited by the Government, the special jurisdictional act in our case provides for just compensation not only as to the taking of the fleet and the unloading apparatus, but "other legal or equitable claims arising out of the transactions in connection therewith" (R. 14).

The principal argument by the Government concedes the taking of contract rights, but seeks to show that such rights had no value. The argument is an effort to break apart the sum total of property rights taken from Goltra and destroy the value of each separately.

Thus, it is urged that the rental or productive value of the fleet should not be considered because under the terms of the contract all net earnings of the fleet, during the time before the option to purchase was exercised, were payable as rental (Gov. Br., pp. 59-60). This argument, as the Government recognizes (Gov. Br., p. 60), avoids the terms of the contract which provided that the rental so paid should be credited to Goltra toward the purchase price of the fleet when the option was exercised (R. 17-19). In the light of definite proof as to the fleets' rental value (R. 66-72) this provision of the contract can not be disregarded on the Government's theory that under the lease Goltra might not have earned anything through using the fleet (Gov. Br., p. 60). This is discussed fully below.

Subsequently, the Government, dexterously shifting its basis of argument, contends (Gov. Br., pp. 64-66) that the rental value should not be considered because the right to purchase the fleet was at the appraised value; it is contended that the appraised value and market value of the fleet must have been identical and therefore Goltra lost nothing when

the opportunity to purchase the fleet was taken by the Government with the seizure of the fleet; from this the Government concludes that there was no value in the right to use and possess the fleet and by such use earn and pay the purchase price.

Finally, the Government views separately the provision permitting payment for the fleet in fifteen installments, with four per cent. interest on the deferred payments, and concludes that this contractual right standing alone is of no value (Gov. Br., pp. 72-77).

These arguments cannot obscure the fact that the seizure of the fleet and the consequent refusal to permit Goltra to exercise his option (Finding 42, R. 44-45) took from Goltra a very valuable sum total of rights. Without any down payment whatever (other than Goltra's surrender of claims against the Government [R. 15]), Goltra had the right to possess the fleet of nineteen large steel barges and four substantial towboats. He had the right to operate this fleet and to realize earnings therefrom. He had the right to buy the fleet. This right was not one merely to buy at market, but to buy at an appraised value without making any down payment whatever. The payments could be spread over a period of fifteen years, with four per cent. interest on the balance due. In so far as the net rental or use value of the fleet not only paid the installments but exceeded them, these rights had a most substantial value. Where, as here, the evidence shows that, by the acceptance of one offer to rent the fleet for five years, Goltra could have paid for the fleet out of its net rental and still had more than $1,500,000 left over (R. 66-68), it is not difficult to realize that the contract rights taken from

Goltra with the seizure of the fleet were valuable. Each right cannot be treated separately. The rights are interrelated and are embodied in one contract; just compensation for the taking of these rights must be made on the basis of all the rights together.

II

IN VALUING THE PROPERTY RIGHTS TAKEN, THE OBJECTIVE RENTAL VALUE OF THE FLEET MUST BE CONSIDERED.

The value to be placed on the rights taken from Goltra with the seizure of the fleet must depend largely upon the productive value of the fleet. It has never been our contention that such productive value is recoverable specifically (Plff.'s Main Br., p. 26). But it does not follow that the productive value is not to be considered at all. On the contrary, this Court has held, for example, that while anticipated profits may not be recovered as such, the profitable nature of a contract is an element to be taken into account in determining just compensation for the contract (*De Laval Co.* v. *United States,* 284 U. S. 61, 72). Our complaint is that the court below did not consider the productive value at all in determining the amount of just compensation for the rights taken.

This productive value, as we have urged in our Main Brief, is the rental value of the fleet (pp. 22-23). That is an objective value which has nothing to do with profits earned or anticipated. The Government, in its argument, fails to understand this rule. The error of the Government's contention that rental value is admissible in evidence

to measure the use value of a vessel only if commensurate profits from operation can also be proved, is well explained in a note in 39 Harvard Law Review 760, where comment is made on the early English view, and the American rule of objective rental value is stated. The note is in part as follows (pp. 761-762):

> "The theory of compensation for the objective value of the plaintiff's right of use, which is followed by most of the American authorities, seems to be the sounder. The value of a chattel lies in the value of the rights incident to its ownership. Thus an owner who is deprived of the use of his vessel has had taken from him one of such rights, and should recover the objective value of this right. The liability of the wrong-doer results from his putting it out of the power of the owner to use his vessel as he sees fit, and the fact that the owner would not actually have used it does not affect the value.
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> * * * * * * * *
>
> "Accepting the theory of 'objective compensation,' the further question arises as to what evidence is admissible to determine this objective value. If the vessel had a market rental value, this would obviously be the best evidence of the value of its use and other evidence should be inadmissible."

The rule is similarly stated in 27 Columbia Law Review 98.

In *Jackson* v. *Innes,* 231 Mass. 558, the defendant "with force and arms took and carried away" plaintiff's boat and converted it to his own use. The court stated the measure of plaintiff's recovery as follows (pp. 560-561):

> "The plaintiff who is entitled to full compensation for all the injury suffered also can have damages for the loss of the use of the boat during the period

> of detention. *It is of no consequence that no income was derived from it.* The defendant who is a wrongdoer cannot avoid liability on that ground. * * * And evidence of the fair market rental value for the use of the boat was admissible on the question of damages." (Italics ours.)

For similar decisions see *The Lagonda,* 44 Fed. 367, 369 (E. D. N. Y.), and *Williamson et al.* v. *Barrett et al.,* 13 How. 101, 111-112. Many state court decisions have held that the use value of a chattel is determined by the rental value whether the chattel was used for profit purposes or otherwise. *Banta* v. *Stamford Motor Co.,* 89 Conn. 51, (discussion in connection with propriety of liquidated damages for delay in delivering a pleasure yacht); *Meyers* v. *Bradford,* 54 Cal. App. 157 (rental value for pleasure automobile); *Cocke* v. *Edwards,* 215 Ala. 8 (reasonable market use value for pleasure automobile); *Rapp* v. *Mabbett Motor Car Co., Inc.* 201 App. Div. 283, 287, N. Y. App. Div. (4th Dept.) (market use value for pleasure automobile); *Dettmar* v. *Burns Bros.,* 111 Misc. 189, N. Y. App. Term (2nd Dept.) (rental value for pleasure automobile); see also *Naughton Mulgrew Co.* v. *Westchester F. Co.,* 105 Misc. 595, N. Y. App. Term (1st Dept.) (holding that trial court had erred in determining that use value was to be calculated on the basis of average profits of taxicab instead of on the objective rental value).

The cases also hold that where prospective profits are too uncertain to furnish a basis for substantial recovery, the objective rental value may none the less be resorted to. *Griffin* v. *Colver,* 16 N. Y. 489, 492, 493, 497; *Witherbee* v. *Meyer,* 155 N. Y. 446, 449; *Boyle* v. *Reeder,* 23 N. C.

607, 614; *Gas Co.* v. *Glass Co.*, 56 Kan. 614, 625, In *Griffin* v. *Colver, supra,* the court in rejecting evidence as to anticipated profits and holding that recovery should be based upon rental value of machinery said (pp. 496-497):

> "The rent of a mill or other similar property, *the price which should be paid for the charter of a steamboat,* or the use of machinery, &c., &c., are not only susceptible of more exact and definite proof, but in a majority of cases would, I think, be found to be a more accurate measure of the damages actually sustained in the class of cases referred to, considering the contingencies and hazards attending the prosecution of most kinds of business, than any estimate of anticipated profits; * * *" (Italics ours.)

It is apparent, therefore, that the use or productive value which should be considered here is not prospective profits.

If the Government insists that the measure of recovery here is legal damages, the error in failing to consider the rental value is equally substantial. In that event, as the cases just cited show, rental value is recoverable specifically as the most certain measure of damage suffered by reason of the Government's action. The evidence of rental value in the present case is definite and certain; it relates specifically to the time of the seizure (R. 67-72). In an ordinary action at law the rental for the two years necessary to reconstruct the fleet (R. 67) would at least be allowed. This alone would have amounted to over $2,000,000 (Main Br., Appendix C). The stipulated appraisal value of the fleet certainly did not include, as the Government seems to intimate (Gov. Br., p. 67), the rental value during the time

of reconstruction. In an action at law in which use value became material, that value would be recoverable specifically quite apart from the value of the fleet.

The cases just discussed show that use value is measured by rental value not by prospective profits. The Government's statement that while Goltra operated the fleet he made no profits has no relevancy. In addition, Goltra's failure to realize profits was largely due to the action of the Government and aggravates rather than diminishes the wrong for which recovery is sought.

We take distinct issue with the argument that substantial profits could not have been realized by Goltra in operating the fleet under the terms of the lease if the conduct of the Secretary of War had been proper.

The restrictions in the lease did not themselves render Goltra's contract valueless. The inability on the part of Goltra to make profits was not due to the restrictions but to the unwarranted action of the Secretary of War in relation to these restrictions. The entire restrictive clause upon which the Government bases its argument is as follows (R. 16):

> "That the said lessee shall operate as a common carrier the said fleet of three or four towboats and nineteen barges upon the Mississippi River and its tributaries for the period of the lease and of any renewals thereof, transporting iron ore, coal and other commodities at rates not in excess of the prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War; but nothing herein shall be deemed to prevent the most profitable and most advantageous use of said

vessels being made provided the Secretary of War consents to such use other than as a common carrier."

Initially the Secretary of War realized that under this clause he must at least permit Goltra to charge a rate which would enable him effectively to compete with railways (Finding 9, R. 32). Subsequently, however, when it became apparent that upon delivery of the fleet to Goltra his fleet would compete with the Government barge line, which had been established between the time when the original contract was entered into and the delivery date (cf. Finding 6, R. 31, and Finding 8, R. 31), the Secretary of War withdrew the permission theretofore given to Goltra to charge less than the rail rate and ultimately compelled him to charge the full rail rate on all cargo which could be carried in competition with the Government barge line (Findings 11, 12, 14, R. 33-34). This action was motivated by the Secretary of War's position that he "could not authorize or approve any operation on the lower Mississippi that would enter into competition with the established line of barges," and that any rate charged by Goltra must be agreed to by the Chief of the Government service "and the operators" of that line (Finding 11, R. 33).

The Government now seems to argue that the conduct just described would, to a large extent, prevent competition with rail carriers and so make it impossible for Goltra to realize profits (Gov. Br., pp. 61-62). The court below has stated that plaintiff's failure to make profits "can be well understood" (R. 54). One of the elements entering into such understanding was that "Plaintiff was prohibited from charging less than the rail rate" (R. 54). As to the failure

to make a profit during the period of operation under the injunction, the court below concluded "this was primarily due to the fact that all shippers on the Mississippi River realized that the fleet was tied up in litigation and possession was being sought through the courts by the defendant" (R. 54).

Whatever may have been the rights and powers of the Secretary of War under the clause of the original contract above set forth, the Secretary was certainly not within his legal rights in preventing operation of the Goltra fleet in competition with the subsequently established line of barges. The Government as a party to the original contract owed a duty to Goltra to refrain from using the power reserved to its officers for the destruction of the rights given to Goltra.[1] We are not dealing with the situation where the Secretary of War in the proper exercise of his duties as a United States officer acted either in a sovereign capacity or in good faith under the provisions of the original contract. On the contrary, we have the situation where an officer of the Government acted to protect a Government barge line which was not in existence when the original contract was made and acted with the intention of preventing Goltra from using the rights conferred upon him under his contract in such a manner as to compete with the subsequently established Government line. Such conduct will not be permitted by the courts. *Manners*

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[1] *United States* v. *Peck*, 102 U. S. 64, 65-66; *Anvil Mining Company* v. *Humble*, 153 U. S. 540, 552; *Manners* v. *Morosco*, 252 U. S. 317, 326-327; *Harper Bros.* v. *Klaw*, 232 Fed. 609, 612-613; *Louis Leavitt* v. *United States*, 60 C. Cls. 952, 972, 973; *Patterson* v. *Meyerhofer*, 204 N. Y. 96, 100-101; *Kirke La Shelle Co.* v. *Armstrong Co.*, 263 N. Y. 79, 87.

v. *Morosco,* 252 U. S. 317, 327; *Harper Bros.* v. *Klaw,* 232 Fed. 609, 612-613.

The analogy between these cases and the present case is close. In each the court held that the licensee had been granted only the right to produce plays and not the motion picture rights. In both cases, however, it was found that the production of the play in motion pictures was not contemplated by the parties when the license agreement was made and that, accordingly, it would be improper for the licensor to permit the production of the play in motion pictures which were competitive with the licensee's production of the play. In the present case not only did the Government create a competing barge line, but then took steps to prevent competition by Goltra with that line. Whatever else may be said of such conduct, certainly the Government cannot now claim that its wrongful conduct on this score should be considered as decreasing the use value of the vessels and preventing a substantial recovery.

In any event the restrictions as to operation would not apply after the option to purchase had been exercised.[1] Goltra twice exercised his option (Finding 10, R. 32; Finding 42, R. 44-45). The Government refused to perform its obligations (*id.*). The seizure of the fleet was assigned by the Government itself as sufficient reason for its action on the second occasion (Finding 42, R. 44-45). This action on the part of the Government is one of the "other legal

[1]The restrictive provision is "for the period of the lease" (§ 2 (a) R. 16), but when the parties contemplated a provision to be effective after the exercise of the option they so stipulated by saying "during the period of the lease, and in case of sale until title passes to the purchaser" (§ 2 (c) R. 17).

or equitable claims arising out of the transactions in connection" with the seizure (R. 14) and the petition makes this action one of the bases for recovery (Par. XVIII, R. 9). If the Government had not acted in violation of Goltra's rights, he could have rented the fleet to the Standard Oil Company pursuant to the terms of the offer made by that company, and thus realized precisely the rental figure which we contend should have been taken into consideration (R. 67-68). It is difficult to see how the Government can now claim that the right to possess the fleet and the contract rights had no substantial value because the Government, in addition to the seizure, committed another wrong.

III

THERE CAN BE NO QUESTION AS TO THE CREDIBILITY OF THE EVIDENCE ON RENTAL VALUE.

Plaintiffs' evidence of rental value was rejected by the Court of Claims solely as a matter of law (R. 54). The evidence consisted not only of unimpeached expert testimony (R. 69, 70-72), but also of statements made by Colonel John C. Gotwals, who represented the defendant (R. 69), and the testimony of an expert called by defendant in this litigation (R. 72). In addition the Government has stipulated on this appeal that Standard Oil Company of Louisiana made an offer in good faith to rent the Goltra fleet at the rental value testified to by plaintiffs' experts (R. 67). The Commissioner of the Court of Claims on the evidence presented made the finding of rental value requested by the plaintiffs (R. 59-60). The insinuation

that there is anything incredible about the evidence (Gov. Br., p. 59) as to rental value is therefore wholly unwarranted. Even the Government introduced evidence and asked for a finding on rental value in the court below (R. 69, 72). We are not now concerned with the amount of such value but with the problem whether rental value, at whatever figure it may be found, should be considered.

Since the decision in *The Conqueror,* 166 U. S. 110, 134 (Gov. Br., p. 59), experience has indicated that there is nothing unusual in a rental or use value for a vessel which in a relatively short period of time approximates a substantial percentage of the vessel's original cost. This Court knows, for example, that the earning power of vessels during the first world war was tremendous. One or two successful voyages were sufficient to pay the complete cost of a ship.

In the light of present experience it is not unusual to find, at a time when there was shortage of river equipment on the Mississippi River and when it would have taken two years to reproduce the Goltra fleet, that the rental value of this exceptional fleet should be the amount testified to by the experts, and in fact offered by Standard Oil Company of Louisiana.

IV

THE INTEREST DIFFERENTIAL MUST BE CONSIDERED.

One of the rights which Goltra lost by the seizure of the fleet was the contract right to possess the fleet immediately and to pay for it in fifteen equal annual installments

with four per cent. interest on the deferred payments. This was not, as the Government seems to contend, a contract for the loan of money (Gov. Br., pp. 76-77). The contract was one whereby Goltra obtained immediate possession of the fleet and obtained most satisfactory terms for paying therefor. In evaluating the contract it is patently necessary to consider whether the terms of the financing were in fact favorable or whether they could have been readily obtained elsewhere. The undisputed evidence shows that the terms of financing were most favorable, that they could not have been obtained elsewhere, and that any similar financing, if it could have been arranged at all, would have required not only the payment of a substantial bonus but interest at a rate in excess of six per cent.[1] (R. 76-82). At least the differential in interest rate should be considered.

To this contention the case of *Ches. & Ohio Ry.* v. *Kelly*, 241 U. S. 485 (Gov. Br., pp. 74-75), furnishes no answer whatever. In that decision it was held that the trial judge in an employer's liability case erred when he instructed the jury to award for the death of an employee his total estimated earnings. The proper instructions should have been that the jury must discount such earnings to a present value. This was to be accomplished by award-

[1]This evidence (R. 76-82) demonstrates the impossibility of obtaining another fleet upon terms anywhere near as favorable as those in Goltra's contract with the Government and answers the question now asked relative to Goltra's failure to build a substitute fleet (Gov. Br., p. 73, Note 24). It is one thing to finance out of income under a contract permitting this procedure; it is quite another to obtain a substantial amount of cash with no security other than future earning power.

ing a sum which, if invested in conservative investments would, together with a pro rata expenditure of the principal, yield the estimated earnings over a period of the deceased's life expectancy. We are at a loss to find the remotest analogy between that decision and any question here raised.

If, however, the value of the contract rights taken from Goltra by the seizure of the fleet is to be evaluated in part as if the contract had been one to loan money, it is elementary, where the borrower is unable to obtain a loan elsewhere upon the same terms, that the difference between the interest rate contracted for and the ordinary prevailing interest rate is one important element in fixing legal damages.[1] Cases cited at pages 76 and 77 of the Government's Brief do not stand for any contrary proposition.

V

THE SAME ELEMENTS MUST BE CONSIDERED UNDER THE SECOND CAUSE OF ACTION.

For the reasons which we have above stated, the rental or productive value of the unloading apparatus and the other factors discussed in our Main Brief (pp. 27-28) must be considered in evaluating the rights taken under the supplemental contract. Whatever may be the effect of the correspondence embodied in Finding 52 (R. 46-47) it is not

[1] *Hedden* v. *Schneblin*, 126 Mo. App. 478; *Farabee-Treadwell Co.* v. *Bank & Trust Co.*, 135 Tenn. 208; *Shurtleff* v. *Occidental B. & L. Ass'n.*, 105 Neb. 557, 561; *Doddridge* v. *American Trust & Savings Bank*, 98 Ind. App. 334; *Anderson* v. *Hilton & Dodge Co.*, 121 Ga. 688.

a waiver of the claims here made for the period from the seizure to August, 1930 (*Cf.* Gov. Br., pp. 79-80). For that period at least recovery of just compensation under the second cause of action should be awarded.

VI

THE AWARD OF THE COURT OF CLAIMS WAS WHOLLY INADEQUATE.

The fleet which was seized was composed of most substantial steel river vessels, valued at more than $3,500,000 at the time of the seizure (Finding 15, R. 34-35; R. 66-67). The contract rights which were also taken enabled Goltra to enjoy the possession of the fleet without any down payment whatever. He had fifteen years in which to pay for this fleet out of earnings. The acceptance of the five year Standard Oil offer alone would have enabled him to pay for the fleet, become the outright owner of it and have in addition well over $1,500,000 income (R. 66-67). That the use value of the fleet was far in excess of the amount awarded has been fully demonstrated in our Main Brief (pp. 24-26). The interest differential alone amounts to over six hundred thousand dollars (Main Br., Appendix C). The rental value for the two years necessary to reconstruct the fleet exceeds two million dollars (Main Br., Appendix C). The rental value for the life of the fleet runs into many millions (Main Br., Appendix D). The contract under which these rights accrued to Goltra was no gift from the Government but was made by the Government in consideration in part of the release of claims which Goltra had against the Government (R. 15). The award

of some $160,000 for the taking of all these rights must appear on the face of things wholly disproportionate. We do not urge this as an independent ground for reversal in the absence of the legal errors which we have pointed out. But this argument answers the Government's contention that what has been awarded here was more than adequate (Gov. Br., pp. 80-81).

CONCLUSION

On the appeal of the United States the judgment below should be affirmed. On the appeal of cross-appellants the judgment below should be reversed with directions to consider the additional factors set forth in our Main Brief in arriving at an award of just compensation.

Respectfully submitted,

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January 3, 1941.